

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of Part 90 of the)
Commission's Rules to Facilitate)
Future Development of SMR Systems)
in the 800 MHz Frequency Band)

PR Docket No. 93-144
RM-8117, RM-8030,
RM-8029

Implementation of Sections 3(n) and 322)
of the Communications Act Regulatory)
Treatment of Mobile Services)

GN Docket No. 93-252

Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding)

PP Docket No. 93-253

To: The Commission

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COMMENTS OF SMALL BUSINESS IN TELECOMMUNICATIONS
TO PETITIONS FOR RECONSIDERATION

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SUMMARY

SBT is a trade association of small businesses active within and throughout the telecommunications industry which are quite interested in the outcome of this proceeding and the effect that the Commission's rules will have on their future competitiveness.

SBT supports those petitions which have challenged the Commission's authority to employ auctions for the purpose of EA-wide licensing and those petitions which have cited the Commission's failure to faithfully act in accord with the tenets of the Administrative Procedures Act.

The Association supports those petitions seeking a comprehensive rule making which will provide simultaneous treatment of all issues arising out of re-regulation of the 800 MHz spectrum, including SMR channels and all industrial/public safety uses of the spectrum. It is apparent that these issues are fully intertwined and cannot logically be segregated into bifurcated rule makings.

SBT supports those petitions which seek an exploration of alternative licensing procedures, rather than employment of auction processes. It is now obvious that the Commission's attempts to accommodate the needs of small business and other designated entities has not met with success, particularly when the Commission is dealing with occupied spectrum.

SBT strongly avers that no "industry consensus" exists as is described by some of the petitioners and respectfully requests that the Commission reject all statements to the contrary as unsupported by fact or the record. Nor does SBT support any attempt to foist upon small operators a position which provides no opportunity for future growth or justification for the Commission's stated intention to employ auctions.

The Association, therefore, requests that upon reconsideration the Commission focus more carefully on the harm to be visited upon small business if its adopted rules are made law.

Finally, SBT strongly opposes the Petition filed by Nextel Communications, Inc. as wholly and obviously self-serving, without any consideration for the Commission's need to balance the injury to be visited upon small business as against any objectives which Nextel might attempt to gain in furthering its dominance of the market.

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To: The Commission

COMMENTS OF SMALL BUSINESS IN TELECOMMUNICATIONS
TO PETITIONS FOR RECONSIDERATION

Small Business in Telecommunications (SBT) hereby files consolidated comments to those Petitions For Reconsideration of the Commission's First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, released December 15, 1995 (FCC 95-501) ("the Order") submitted by various parties in this proceeding and states the following:

SBT's Interest

SBT is a non-profit trade association of small businesses serving the telecommunications marketplace.¹ SBT's members are intensely concerned with the outcome of this proceeding,² since its membership includes SMR operators in numerous areas of the Country. Additionally, SBT believes, as confirmed by the Commission's statements within its Notice of Proposed Rule Making WT Docket 96-18 (released February 9, 1996), that its decisions in this proceeding will be employed, in part, as guidance in future proceedings, affecting other portions of the telecommunications marketplace. Since all small business is, thus, directly or potentially affected by the outcome of this proceeding, SBT is acutely aware of the importance of this matter and seeks to assist the Commission in its consideration of the Petitions For Reconsideration received.

SBT Supports Those Entities Which Have Challenged

The Appropriateness Of The Adopted Rules And Decisions

SBT notes that numerous parties have challenged the Commission's authority to proceed with the use of auctions as the manner of issuing licenses to persons seeking EA-

¹ SBT voting members are companies whose annualized income is less than \$20 million dollars and, in most instances, less than \$3 million. Accordingly, SBT represents a class which Congress has sought to protect and which the Commission has determined to be designated entities for special treatment in accord with its mandates contained within the Communications Act of 1934 (as amended).

² Since SBT is a new organization, it was not possible for it to appear within this proceeding at any earlier time.

wide authority, to operate 800 MHz systems.³ Some petitioners question the Commission's authority based on its compliance with the Administrative Procedures Act and some cite non-compliance with the tenets of the Communications Act of 1934 (as amended) ("the Act"). Taken as a whole, the petitioners have suggested that the Commission's actions within this proceeding are inconsistent with its legal duties and authority as granted by Congress.

The Commission's authority to auction occupied spectrum in the manner proposed and later adopted was a matter of great concern to numerous commenting parties. That concern obviously continues to exist and the chorus of petitioners which continue to state a unified belief that the Commission lacks the requisite authority to act in the manner proposed has created the vast number of parties seeking reconsideration of the Commission's Order. SBT supports the comments of those petitioners seeking reconsideration on the grounds that the Commission lacks requisite Congressional and statutory authority. SBT respectfully notes that this underlying problem has tainted this entire proceeding and should have been fully addressed in the Commission's Order. Instead, the Commission appeared to operate under an unsupported assumption that it possessed all requisite authority and did not deem the matter worthy of a complete, reasoned analysis.

The Commission was provided an opportunity to resolve this issue in the first instance in response to a Motion To Defer filed on December 4, 1995 by Fresno Mobile Radio, Inc.

³ See, e.g. Petitions filed by Banks Tower Communications, Ltd, *et al* ("Banks Petition"); Personal Communications Industry Association ("PCIA Petition"); The Southern Company ("Southern Petition"); and Entergy Services, Inc. ("Entergy Petition").

et al, ("the Motion") which relied on the statement filed with the Commission by eleven members of Congress, stating that those members did not believe that the Commission's auction authority was intended to be employed in the manner adopted. In the Petition filed by Supreme Radio Communications, Inc. *et al* ("Supreme Petition"), petitioners noted that the Commission's failure to respond to the Motion was violative of 5 U.S.C. §553(e) and, thus, the Commission was not procedurally positioned to go forward in the adoption of the rules promulgated by its Order, *Id.* at 11. SBT concurs with the Supreme Petition and respectfully requests that the Commission set aside its Order until such time as a response to the Motion is adopted.

The numerous petitions filed in this matter, requesting reconsideration based on the Commission's lack of requisite authority, fully demonstrate the need for such relief and the Commission's duty to respond to the Motion. It is apparent that the Motion was neither frivolous nor inappropriate nor submitted for purposes of improperly delaying the Commission's efforts. Instead, it is apparent that numerous parties continue to question the Commission's underlying authority, in addition to the numerous persons and entities which questioned the Commission's authority in the first instance within dozens of comments filed within this proceeding.⁴ Accordingly, SBT hereby states its support of those comments made

⁴ SBT agrees with the statement within the PCIA Petition at 5, fn. 11, which points out that this issue has been subject to ongoing petitions for reconsideration and that the matter is far from settled, contrary to the Commission's reliance upon its decisions within Competitive Bidding Second Report and Order. Nor may the Commission reasonably find that a general statement of auction authority may apply to each specific instance of its use, under unique circumstances which are relevant only to a particular radio service or spectrum.

by various petitioners which challenge the Commission's authority to employ auctions for the granting of EA-wide authority; and SBT provides its support of the specific comments within the Supreme Petition, citing the procedural defect of the Commission's action without fulfillment of its duty to rule initially on the Motion.

SBT Supports Petitions Which Request

A Simultaneous Treatment of all 800 MHz Issues

It is apparent that the Commission has erred in its piecemeal approach to re-regulation of the 800 MHz spectrum. Within this proceeding, the Commission has attempted to segregate issues on a channel block-by-channel block basis and its approach has not been successful.⁵ This problem should have been foreseen by the Commission, however, regardless of the advantage of hindsight, the Commission should now recognize that its attempt to auction the upper 200 800 MHz channels, employing forced relocation of incumbent operators to the lower channels, including a redesignation of the General Category frequencies for the purpose of auctioning EA-wide licenses in the lower 150-channel band, are all intertwined. Each action has created side effects and adverse reactions to an ever

⁵ SBT strongly disagrees with the PCIA Petition wherein PCIA suggests that a consolidated approach to the 800 MHz issues would provide a basis for resolution of all outstanding issues, including a resolution of the question of the Commission's authority to engage in auctions, Id at 16. SBT does not join in the alleged "industry consensus" which did not include support from over one hundred commenting SMR operators, see, e.g. Comments filed by Fresno Mobile Radio, Inc. *et al* within this proceeding. Nor would the Commission find support for the alleged consensus among the petitioners seeking reconsideration, see, e.g. Petition For Reconsideration filed by the Industrial Telecommunications Association ("ITA Petition"). Accordingly, SBT points out that which should now be obvious to the Commission -- no industry consensus exists at this time.

widening group of injured or threatened licensed operators, which have now come forth to request reconsideration.⁶

SBT believes that only by employing a consolidated approach to treatment of all affected operators on 800 MHz channels will the Commission and the public be able to assess and provide adequate comments to the ultimate effect of proposed rules. The Commission's alternative approach has resulted in problems arising out of compliance with the Administrative Procedures Act ("the APA") which requires adequate opportunity for notice and comment and petitioners have pointed out the Commission's failure to comply with the plain language of the APA.⁷ To avoid the continuing problems with the Commission's performance of its duty under the APA, SBT respectfully suggests that the Commission should, upon reconsideration, set aside its Order and commence a consolidated rule making which seeks to explore all of the overlapping issues arising out of future regulation of the 800 MHz frequency band. To do otherwise will place the Commission at continuous risk of violation of the APA and subject the industry to the uncertainty which has characterized this entire proceeding.

⁶ See, Petitions for Reconsideration filed by UTC, The Telecommunications Association ("UTC Petition"); ITA Petition; J.A. Placek Construction Co. ("Placek Petition"); Federal Express Corporation ("Federal Express Petition"); General Motors Research ("GM Petition"); and Warner Communications Co. ("Warner Petition").

⁷ See, Supreme Petition at 11, Petition of Pro-Tec Mobile Communications, Inc. et al at 10 ("Pro-Tec Petition"); Entergy Petition at 3, citing, e.g., Home Box Office v. Federal Communications Commission, 567 F.2d 9, 36 (D.C. Cir. 1977) and Florida Power & Light Co. v. United States, 846 F.2d 765, 777 (D.C. Cir. 1988).

SBT Supports An Examination Of

Alternative Licensing Procedures

As shown *supra*, many petitioners have questioned the Commission's use of auction authority for grant of EA-wide licenses, either in the upper 200 channels or for licensing of General Category frequencies. Petitioners noted that nothing contained within 47 U.S.C. §309(j)(6) requires the Commission to employ auction authority and, in fact, that Section of the Act states that grant of auction authority to the Commission by Congress shall not "be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, or other means to avoid mutual exclusivity in application and licensing proceedings." (emphasis added). It is, therefore, obvious that Congress intended that the Commission first attempt to avoid mutual exclusivity, employing alternative means.

Within the Pro-Tec Petition and the PCIA Petition, the Commission was asked to reconsider its decision to bring it into compliance with its duty to explore and employ alternative procedures for licensing of systems. SBT supports these requests for compliance with Section 309(j)(6) and avers that such action is necessary for the Commission to lawfully go forward in its use of any auction authority. At present, the Commission has evidenced a desire to look first at the use of auctions as the primary method for issuing future licenses. The plain language of the Act fully demonstrates that the Commission's approach is inapposite to the tenets of the Act and undermines any finding that the Commission has acted within its Congressionally mandated authority.

To date, the Commission's articulated reasoning for employing auctions has focused on two proffered justifications: an alleged reduction in the administrative resources necessary to license 800 MHz systems and a desire to produce regulatory parity. SBT disagrees with the Commission's statements that these desires serve as adequate justification for its actions and supports those petitions which challenge the appropriateness of these justifications.⁸ In particular, SBT supports those petitioners which have accurately noted that the Commission's interpretation of its duty to create regulatory parity is not and will not be served by its decisions within its Order.⁹ SBT supports those petitions which note that in its zeal to comply with the terms of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002(b), 107 Stat. 312, 392 (1993), codified at 47 U.S.C. §332 ("the Budget Act"), the Commission has neglected its obligation to support and promote the interests of Private Radio operators, users and licensees, in accord with the remainder of Section 332 of the Act. "Nowhere within the [Order] does the Commission address the fact that its provision of alleged regulatory parity will also adversely affect private land mobile radio service (PMRS) operators, improperly subjecting such operators to treatment as CMRS operators..."

⁸ SBT supports the statements within the Petition For Reconsideration filed by Fresno Mobile Radio, Inc. et al at 10 ("Fresno Petition") wherein petitioners stated, "the regulatory scheme adopted by the Commission cannot reasonably be expected to reduce [its administrative] burden to any substantial extent. Instead, it is more likely that the burden on the Commission will be increased." (footnote omitted).

⁹ See, e.g. Fresno Petition, Supreme Petition, PCIA Petition, Banks Petition, and Southern Petition.

Banks Petition at 10-11.¹⁰ This natural and unrecognized adverse byproduct has spawned many of the petitions.¹¹

It is, therefore, clear that the path chosen by the Commission cannot be legally supported among its duties articulated within the Act. Thus, the Commission must now seek alternative licensing methods which are not violative of its duties and the dictates of its Congressional authority and SBT strongly encourages the Commission to set about this task, to avoid the creation of a regulatory regime that is contrary to the whole of the Act.

The Commission Should Have Focused On The
Harm To Small Business Arising From Its Decision

The petitions include many comments addressing the harm to small business which will arise out of the rules adopted by the Commission. Some of those comments are as follows:

...the opportunities for small business necessary to justify the Commission's actions in accord with the applicable portions of the Communications Act were insufficient to provide any reasonable assurance of participation in EA-based licensing by small- or minority-owned businesses. The natural anticompetitive

¹⁰ See, also, Southern Petition at 11-15.

¹¹ See, e.g., Southern Petition, UTC Petition, ITA Petition, etc., which correctly point out that the Commission's attempt to provide parity among CMRS operators should not be extended to the detriment of private operators.

results of these circumstances would create greater concentration of the market into the hands of only the largest entities and undermine the Commission's authority to go forward with its plan to auction 800 MHz spectrum. Supreme Petition at 2-3.

...[a] potential auction winner would not only have to pay the cost of the EA license, but would also have to pay to obtain sufficient replacement spectrum in the 800 MHz band for the retuning of incumbents. It also appears that an auction winner would have to relocate an incumbents [sic] entire system which effectively precludes most participants from the auction. Southern Petition at 10-11.

Petitioners respectfully aver that the Commission's analysis of the competitive impact of its decision was woefully flawed and incomplete and not designed to result in reasoned decision making. The analysis failed to address the adverse competitive impact on small business and site-specific licensees, or to provide any support for such a result; failed to demonstrate any analysis concerned with overconcentration of market share by a few operators, in particular Nextel Communications, Inc.; and failed to demonstrate any consideration of the potential violations of the Sherman Act arising out of licensees' acting in accord with the regulatory regime created. Fresno Petition at 24.

A single licensee must not be permitted to dominate a single service and will effectively exclude small businesses from the agency's licensing procedures...

The Commission's proposal has the impact of limiting participants in an auction to Nextel and its affiliates. PCIA Petition at 14.

The entire thrust of the 800 MHz Decision demonstrates a profound disrespect for the legitimate rights and requirements of industrial, business and public safety licensees. ITA Petition at 5.

The reallocation and auction of General Category channels will cause irreparable damage to the internal communications systems of the nation's critical industries. Warner Petition at 1.

...the Commission has seemingly turned its back on small businesses offering local or regional service in favor of large corporations which seek to offer wide-area service. Petition of Resource Benefits, Inc. at 2 ("RBI Petition").

Even America Mobile Telecommunications Association, one of the Commission's most stalwart supporters of its auction plan and proposal to force frequency relocation upon incumbent licensees' stated, "AMTA agrees with the Commission's assessment of the difficulties encountered by small businesses when seeking spectrum through the competitive bidding process." AMTA Petition at 3.

Objectively observing the comments, petitions, ex parte documents, and record of this proceeding, SBT notes that there is but one true industry consensus upon which the Commission may reasonably rely, which is reflected by the following statement:

The Commission's adopted rules will adversely effect small businesses, without the justification required by the Communications Act of 1934 (as amended).

SBT avers that this conclusion is universally accepted by all commenting parties and petitioners, excepting those comments and petitions submitted by Nextel Communications, Inc. and its affiliates. For this reason alone, the Commission should take this opportunity to reconsider its Order and seek an alternative licensing scheme that it not abusive to the interests of small businesses.

Small businesses are an essential portion of the competitive mix enjoyed within this industry. Nothing within the comments received support any conclusion that small businesses are neither competitive nor necessary to a continued healthy marketplace. To the contrary, the comments and petitions demonstrate fully that small SMR operators and General Category operators are an important component in the provision of two-way services to the public and for the benefit of private entities. Yet, the Commission's Order minimizes the contribution of these industry members without justification or purpose.

SBT strongly disagrees with the Commission's dismissal of small business within this proceeding and hereby supports in the strongest of terms the efforts of those petitioners which have reflected the rights and reasonable expectations of small business, incumbent operators, public safety entities, and private industrial users and which have sought to direct the Commission's attention away from the "easy auction answer" and toward a more equitable and reasonable approach. The courage shown by those persons who believe that government serves best when it takes into account all affected parties, and not just the largest entities, is laudable and should be fully considered in the Commission's future actions.

SBT disagrees with the PCIA Petition which suggests that small business and similarly situated parties will be satisfied with some negotiated settlement which continues to limit the competitiveness and futures of adversely affected operators. The offer suggested by PCIA is neither satisfying nor ameliorative of the injury to be visited upon small business. Instead, it represents a few orts in exchange for giving up a banquet of opportunity. This is simply not enough.

Instead, SBT supports those petitioners which seek first to direct the Commission's attention at past abuses of its processes which have created vast spectrum warehouses for a few operators, and request that no new rules be produced until such time as the Commission has first emptied these inventories of fallow spectrum. The Commission must first enforce its existing rules to remove the harm to the public: to legitimate, local operators; and to its

processes created by the actions of the few, to properly position itself to move forward for the benefit of the many.

SBT Opposes Nextel's Petition

As the Commission is aware, the rules adopted in its Order favor the efforts of Nextel Communications, Inc. This is no secret and, were it not for the injury to be visited on end users and local operators by those same rules, Nextel's status as primary (and perhaps singular) beneficiary would be of little interest to SBT and most others. However, since it is apparent to all, *see*, e.g. PCIA Petition, that Nextel will benefit while others will suffer, SBT is shocked by the further effrontery contained within Nextel's Petition for Reconsideration. Its audacity is such that it can be read as little more than choreography for a dance on the graves of small businesses.

At Page 3 of its Petition, Nextel embraces the alleged deal struck between itself, AMTA and SMR WON, which Nextel claims will provide a basis for resolving all disputes arising out of the Commission's regulation of both the upper 200 SMR channels and the General Category channels. Nextel even goes so far as to speak on behalf of AMTA and SMR WON when it states, "[e]ach of these commenters fully believes that, when coupled with their proposed settlement process, the Commission's general auction and mandatory relocation/retuning rules for the upper channels will offer all SMR participants a fair and equitable opportunity for operation and growth in the SMR industry." Nextel Petition at fn. 5. SBT disagrees with Nextel's conclusion. The rules will not lead to either opportunity or

growth for incumbent licensees, except Nextel and its affiliates. The "proposed settlement process" is a loosely worded suggestion, joined under duress by some operators seeking a small amount of relief from years of spectrum warehousing and application freezes. The SMR industry has been under siege by Nextel's business practices and the Commission's regulatory policies. It is, therefore, not surprising that some of the victims of the siege have surrendered.

SBT is also not surprised by the remainder of Nextel's statements, including its support for the allocation of the 120-channel block closest to the cellular frequencies, Nextel Petition at 5-6. By now, it should be apparent that Nextel's intent is to merge with cellular carriers via dual-operation systems and that Nextel's system, standing alone, cannot produce revenues necessary to continue. There simply does not exist sufficient market demand.

Nextel states that the Commission was correct in not creating entrepreneur blocks, Nextel Petition at 7, yet simple logic and equity would lead one to a contrary position. In an area of the industry well populated with small companies, entrepreneur block opportunities would provide a natural and necessary extension of existing systems. Nextel also requests that bidding credits and installment payments be rejected, Nextel Petition at 8. Nextel's Petition is designed to remove all equitable opportunity for small businesses and to leverage its dominant position in contravention of the Act and the Commission's earlier comments. Finally, Nextel would like to reduce the level of minimum bids, thereby attempting to insure that the price paid by Nextel at auction is as low as possible. Nextel's litany of self-serving

requests are repugnant to SBT and its members and the Commission is respectfully invited to view the Nextel Petition for what it is -- a blueprint for monopolistic, anticompetitive activity under the color of Commission rule.

The Commission has stated in its Order its intention to open the 800 MHz auction process to everyone. Nextel, in its Petition, demonstrates the futility of that intention. Nextel's Petition at 9-10 would limit the definition of "potential EA applicant" for purposes of pre-auction negotiation to only incumbents. Nextel would also extend the Commission's application freeze to any operator which seeks to swap channels within the upper 200 channel block; and would preclude assignments to non-incumbents of any of the upper 200 channel block. Stated differently, Nextel is requesting that the Commission limit participation in pre-auction settlements to ESMR operators. Although SBT agrees that the Commission's rules will allow only ESMR operators (and even few of those) to benefit by auction, SBT must take issue with Nextel's attempt to limit any operator's ability to engage in private negotiations with any party regarding the sale or exchange of licenses and related assets.¹² Operators should not be placed in a position of simply waiting for Nextel to come shopping.

¹² Nextel's reliance on regulatory solutions over marketplace solutions is evidenced throughout its Petition. However, SBT must point out the contradiction in Nextel's statements which undermines its entire position. "The marketplace alone would not provide the clear, contiguous, exclusive-use spectrum for SMRs that is required by the Commission's regulatory parity mandate." Nextel Petition at 10. "[The Commission's Order] ensures that competitive advantages are determined in the telecommunications marketplace rather than by regulatory obstacles or benefits." Id at 3. It appears that Nextel did not carefully sniff all of the rose petals it was throwing at the Commission to discover whether thorns were present.

The remainder of Nextel's demands are equally, absurdly self-serving: (i) its request that relocation notice by one EA licensee will be deemed sufficient for all, Nextel Petition at 14; (ii) its suggestion that the mandatory relocation period be cut in half, Id at 15; (iii) its demand that EA licensees be able to comment and oppose system licensing of other operators seeking geographic licensing of existing systems, Id at 15-16; (iv) its bizarre and offensive statement that "incumbent rights are at the 'expense' of the EA licensee," Id at 16; and (v) its request that the emission mask requirements only apply to EA licensees at the border of such systems, Id at 18. Each of these suggestions are wholly at odds with the majority of the commenting parties and with the Commission's duty to protect small businesses.

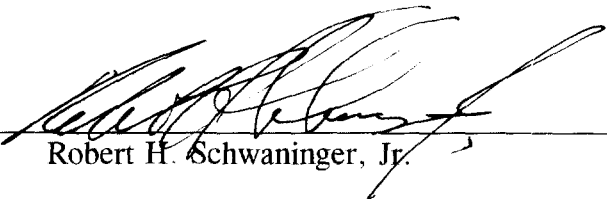
Finally, SBT disagrees with Nextel's general characterization of the Commission's Order, "[The Commission's] resulting rules are fair, fully supported by the record, pro-competitive, and in the public interest." Nextel Petition at iii. Instead, SBT offers a different characterization. The Commission's resulting rules are fair to Nextel and its affiliates only, fully supported by that portion of the record provided by Nextel, pro-competitive as between only the largest carriers (if anyone), and not in the public interest.

Conclusion

SBT disagrees with the Commission's rules promulgated by its Order and supports those petitioners which have sought reconsideration of the Order for the benefit of small businesses in accord with those statements made herein.

Respectfully submitted,

SMALL BUSINESS IN TELECOMMUNICATIONS

By 
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Dated: April 15, 1996

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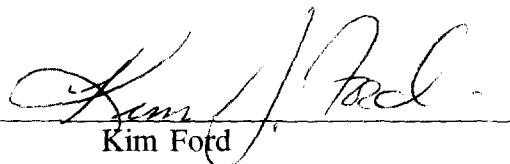
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